

REMARKS

Claims 66-71 and 73-78 are pending and were rejected. The Examiner rejected claims 66, 67, 71, 73, 74 and 78 under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,820,614, issued to Bonutti. The Examiner rejected claims 68-70 and 75-77 under 35 U.S.C. § 103(a) as obvious over Bonutti in view of U.S. Patent No. 5,607,386 issued to Flam. Applicant respectfully traverses the Examiner's rejections.

Applicant previously submitted a declaration under 37 CFR 1.131 establishing that Bonutti is not a prior art reference under Section 102(e) or Section 103(a). The Examiner contends the declaration is ineffective to overcome Bonutti. Applicant respectfully traverses the Examiner's contention that the declaration is ineffective to overcome the Bonutti reference.

Under 37 CFR 1.131, Applicant may overcome a reference by demonstrating "conception of the invention prior to the effective date of the reference coupled with due diligence from prior to said date to a subsequent reduction to practice or to the filing of the application." The Examiner points to a portion of an exhibit attached to Applicant's Declaration. The exhibit includes a form with the following two-part question:

ON WHAT DATE DID YOU FIRST THINK OF THIS INVENTION	(WHAT RECORDS SHOW THIS?)
REDACTED	None

The Examiner incorrectly concludes that this portion of the form constitutes "an admission by the Applicant of insufficient proof of Applicant's effective filing date of invention and insufficient showing of diligence on Applicant's part." The Examiner has improperly required Applicant to show evidence of conception as of the first date of conception instead of showing evidence of conception prior to the effective date of the reference. There is no requirement that Applicant include documentation of the date Applicant first thought of the invention, as suggested by the Examiner. The Examiner does not contend that the declaration does not support conception prior to the filing date of Bonutti. Further, any alleged lack of documentary evidence as of the first date of conception is not pertinent to Applicant's diligence between just prior to the effective date of the reference and Applicant's constructive reduction to

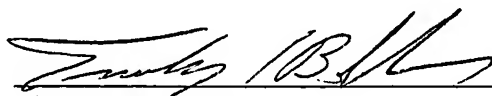
practice. In addition, there is nothing in the statutes or rules providing for an Examiner to deem his interpretation of a portion of an exhibit as a binding admission on the part of an applicant.

Here, the application which led to the Bonutti patent was filed on December 2, 2000. Applicant conceived of the claimed inventions of claims 66 and 73 in the United States prior to the December 2, 2000, filing date of Bonutti, as set forth in the previously filed Declaration of the Applicant under 37 CFR 1.131. Applicant also diligently pursued the claimed inventions from prior to the December 2, 2000, filing date of Bonutti through the constructive reduction to practice that occurred on March 5, 2001, when the provisional application from which the current application claims priority was filed, as set forth in the above-referenced Declaration. Accordingly, Applicant submits that claims 66 and 73 are not anticipated by Bonutti. Claims 67-71 depend from claim 66 and claims 74-78 depend from claim 73. The Examiner does not contend that Flam teaches, suggests or motivates the limitations of claims 66 and 73. Accordingly, claims 67-71 and 74-78 are allowable at least by virtue of their dependencies.

The Director is authorized to charge any additional fees due by way of this Amendment, or credit any overpayment, to our Deposit Account No. 19-1090. All of the claims remaining in the application are now clearly allowable. Favorable consideration and a Notice of Allowance are earnestly solicited.

Respectfully submitted,

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